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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM, 1936

No. 910

GUY T. HELVERING, COMMISSIONER AND OTHERS

Defendants-Appellees-Petitioners

v.

GEORGE P. DAVIS

Plaintiff-Appellant-Respondent

MEMORANDUM AS TO RIGHT TO RELIEF IN EQUITY

[May, 1937]

Manifestly, this suit "arises under the Constitution or laws of the United States." The authorities are collected on pages 3 and 4 of the brief of this plaintiff filed amicus curiae in April, 1937, in No. 837 — Charles C. Steward Machine Company *v.* Harwell G. Davis, Collector. As there is no fundamental lack of juris-

diction, and none of the parties have made any objection because the proceeding is in equity and not at law, any such objection has been waived.

It is waivable.

> *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 554.
>
> *The Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 128 (converse).
>
> *American Mills Co.* v. *American Surety Co.*, 260 U. S. 360, 363.
>
> *Reynes* v. *Dumont*, 130 U. S. 354, 395.
>
> *Buffum* v. *Peter Barceloux Co.*, 289 U. S. 227, 235, 236.
>
> *Re Metropolitan Railway Receivership*, 208 U. S. 90, 110.
>
> *Kingsport Press, Inc.* v. *Brief English Systems, Inc.*, (C.C.A. 2d–1931) 54 F. (2d) 497, 499.

If the objection were open, it is not well founded in the particular case.

If the employer in obedience to the terms of Section 802 makes the payments, he makes them, according to the claim of the Commissioner of Internal Revenue, as payments on behalf of the employees.

If the Section is invalid, it furnishes no answer for the employer to the suits of the employees. So, the employer still must pay the equivalent amounts to the employees to complete the employer's obligation to pay them the agreed wages. He has no right to demand an assignment of refund claims from the employees. Notwithstanding this, it is claimed for the Government that the employer cannot recover the payments, because he made them not on his own behalf but as payments of the employees' monies.

As the employer has no written assignment from the employees, Revised Statutes Sec. 3477, U. S. Code,

Title 31, Chapter 6, Sec. 203, prevents any recovery by the employer.

A very similar situation was considered by the Circuit Court of Appeals for the Fifth Circuit in the *Regents of the University of Georgia* v. *Page* (1936—C.C.A. 5th), 81 Fed. (2d) 577, involving the right of the University of Georgia, which claimed exemption from the Federal Admissions Tax, to bring a bill in equity to enjoin the imposition of the tax upon tickets for admission to its athletic contests. The Circuit Court of Appeals had no difficulty in finding equity jurisdiction by reason of the fact that while the payment was made by the University the right of recovery, if any, for the amounts paid for the admission tax would rest with its patrons who had paid for tickets.

The multitude of claims which it would be necessary for employees to prosecute for refunds of small sums, each insufficient in amount to warrant the expense of a prosecution, would present such a multiplicity of suits as to call for the interposition of a court of equity to prevent this multiplicity which the decision of one suit will avoid.

A right to get a judgment against a Collector of Internal Revenue to which he may be unable to respond except there be an appropriation by The Congress for the purpose, is manifestly not as plain, adequate and complete a remedy as is the remedy of not making the payment in the first instance.

There is additional reason why the bill should lie even if the objection had been taken. The language of the Supreme Court of the United States in the leading case *Ex parte Young*, 209 U. S. 123 at 146 is appropriate. " . . . The necessary effect and result of such legislation must be to preclude a resort to the courts (either state or Federal) for the purpose of testing its [the Law's] validity. The officers and employees could

not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid (146) . . . to impose upon a party interested the burden of obtaining a judicial decision of such a question . . . only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, . . . " (148).

If by the assistance of a court of equity the employer can be relieved from making the unconstitutional payments, the burden ought not to be placed upon the employer of going through the vast amount of accounting work and pacification of a multitude of employees, incident to taking in this year one percent off fifty-two separate weekly payments to each or twelve separate monthly payments to each of thousands of employees, when all this may be avoided by the making of a decision by the court on a constitutional question, which is inevitable before the matter is at rest.

The authorities support the contention.

Ex parte Young, 209 U. S. 123, 146.
Hill v. *Wallace*, 259 U. S. 44, 62.
Brushaber v. *Union Pac. R.R. Co.*, 240 U. S. 1, 9.
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429.
Carter v. *Carter Coal Co.*, 298 U. S. 238 (semble).
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288 (semble).
Dodge v. *Woolsey*, 18 Howard 341 (semble).

EDWARD F. McCLENNEN.
JACOB J. KAPLAN.